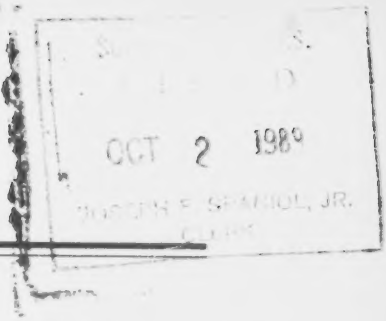

No. 89-265

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

EASTON PUBLISHING COMPANY

Petitioner,

v.

ALFRED R. BOETTGER

Respondent.

REPLY BRIEF OF PETITIONER
EASTON PUBLISHING COMPANY TO RESPONDENTS
BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I. THIS COURT HAS JURISDICTION TO REVIEW THE IMPORTANT CONSTITUTIONAL QUESTIONS PRESENTED IN THIS PETITION.

As will be demonstrated below, the constitutional questions presented in this Petition were deemed by both State Appellate Courts to have been properly presented and said courts ruled upon the constitutionality of the challenged statute. Moreover, the former shareholders of Easton Publishing Company have a continuing financial interest in the outcome of this litigation as set forth in the Order of the Court of Common Pleas of Northampton County, Pennsylvania. Finally, the judgment in this case was never "paid". Rather, escrow funds to satisfy the original judgment in this case were removed from the escrow account without the knowledge or consent of the company's representatives. Moreover, Respondent is seeking additional attorney's fees and costs under the challenged statute.

A. The constitutional questions were properly raised and were reviewed by both State Appellate Courts and are therefore reviewable by this Court.

The constitutional issues presented in the Petition for Writ of Certiorari are properly presented for review by this Court. The issues were raised prior to the entry of the final judgment by the trial court in this matter.

Furthermore, both the intermediate appellate court and the Supreme Court of Pennsylvania passed judgment on the constitutionality of the Pennsylvania Wiretapping and Electronic Surveillance Control Act of 1978.

> Weighing these interests against those contained in the First Amendment's guarantee of freedom of the press, we perceive it readily apparent that Pennsylvania's interest in protecting its citizen's rights far outweighs the negligible effect the Act's blanket prohibition on disclosure creates.

Boettger v. *Loverro* ____ Pa. ____, 555 A.2d 1234 (1989). See Petition for Certiorari at 12b.

In addition, the constitutional questions were also considered by the Superior Court of Pennsylvania.

> Appellant has from the outset, in its answer, and throughout, in its motion for summary judgment, requested points in charge, and motion for judgment n.o.v., argued that it is exempt from liability under Section 5725. In making this argument, appellant has cited the Fair Report Privilege recognized in Restatement (Second) of Torts Section 611 (1976). Appellant has not, however, presented its constitutional argument with equal consistency; although making the argument in its motion for judgment n.o.v., appellant did not make it in either its pleadings or its requested points for charge. Accordingly, as such, the constitutional argument has not been preserved. *The argument is nevertheless before us indirectly, or, so to speak through the back door.* (Emphasis added).

Boettger v. *Loverro* 349 Pa. Super. 134, 502 A.2d 1310 (1986), *rev'd on other grounds* ____ Pa. ____, 555 A.2d 1234 (1989). See Petition for Certiorari at 6c.

This Court has consistently held that when the highest court of a state passes on the constitutionality of a state statute and finds the state statute to be constitutional, such a decision is reviewable by the United States Supreme Court. *Dun & Bradstreet* v. *Greensmoss Builders, Inc.* 472 U.S. 749, 754, n.2 (1985), *citing, Orr* v. *Orr* 440 U.S. 268 (1979).

Furthermore, this Court has consistently held that where a matter of great constitutional import is apparent, that issue will be decided by this Court regardless of whether or not the said constitutional issue was presented by the writ of certiorari. *See, Erie R. Co.* v. *Tompkins* 304 U.S. 64 (1938).

In this case, not only was a matter of great constitutional importance raised by the Petition for Writ of Certioari but that same constitutional issue was the subject of the decision of the trial court, the intermediate appellate court and the Supreme Court of Pennsylvania. Accordingly the constitutional issue is properly preserved for consideration by this Court.

B. The former shareholders of Easton Publishing Company have a legally cognizable financial interest in the outcome of this litigation.

It is well settled that a case or controversy exists and a case may not be considered moot when the parties retain a "legally cognizable interest in the outcome." *United States Parole Comm'n.* v. *Geraghty*, 455 U.S. 388, 396 (1980), *citing*, *Powell* v. *McCormack*, 395 U.S. 486 (1969).

In this case, the former shareholders of Easton Publishing Company are entitled to the proceeds of funds placed in escrow to satisfy the judgment in this case in the event this Court reverses the decision below of the Supreme Court of Pennsylvania. See Jurisdictional Statement, Petition for Certiorari at i-ii.

The Order of the Court of Common Pleas, Northampton County, Pennsylvania (attached as Appendix A) which provides for the distribution and disbursement of the assets of Easton Publishing Company did not extinguish the rights of the former shareholders. On the contrary, the Order provides for the distribution of disputed funds as appropriate to the former shareholders at the conclusion of the litigation.

It is clear that the former shareholders of Easton Publishing Company retain the requisite "legally cognizable interest in the outcome" of this litigation.

C. Petitioner did not consent to the partial payment of the judgment and Respondent is seeking additional attorney's fees under the challenged statute.

In his Brief in Opposition to Petition for Certiorari, Respondent suggests that Petitioner consented to the payment of the judgment. This is not the case. Moreover, Respondent is seeking an additional $18,986.68 in attorney's fees and costs under the challenged statute which have *not* been paid.

During the pendency of the state court appeals in this case, the parties agreed to establish an escrow account with sufficient funds to enable the former shareholders of Easton Publishing Company to satisfy the initial judgment in the amount of $18,409.34. The account was opened with trial counsel for the respective parties as co-signatories. On or about April 20, 1989, counsel for the Respondent withdrew escrow funds without the knowledge or consent of counsel for the Petitioners.[1] See Affidavit of Ronald W. Shipman, Esquire, Case No. 1982-C-2846 (filed Sept. 29, 1989) in the Court of Common Pleas of Northhampton County, Pennsylvania, Civil Division-Law attached as Appendix B. Counsel for Petitioner has made demand upon counsel for Respondent to return said funds to the escrow account. See, Letter of April L. Cordts, Esquire, attached as Appendix C. No response has been received to this demand.

Moreover, Respondent is seeking an additional $17,574.50 in attorney's fees and $1,577.25 in "reasonable litigation expenses" under the challenged statute, the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5725. See, Petition for Award of Reasonable Attorney's Fees and Other Litigation Costs, Court of Common Pleas of Northhampton County, Penn-

---

[1]Counsel for Petitioners first learned that the funds had been withdrawn upon receipt of the Brief in Opposition filed in this case.

sylvania Case No. 1982-C-2846 (filed March 29, 1989). Said Petition appears in its entirety in Appendix D.

Because Respondent is clearly seeking additional attorney's fees and costs under the challenged statute, Respondent's assertion that the judgment has been "paid" is a material misrepresentation of the record in this case.

This Court has held that that payment of an entire judgment does not render an appeal moot. *See, Bank of Merin* v. *England* 385 U.S. 99 (1966). This Court has also held that partial payment of a judgment does not render an appeal moot. *See, U.S.* v. *Houghan* 364 U.S. 310 (1960). In this case, there has been neither an appropriate partial payment nor full payment in satisfaction of the judgment. Consequently, there is an active case-in-controversy to be decided.

Respectfully submitted,

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*Counsel of Record

APPENDIX A

IN THE

Court of Common Pleas of

NORTHAMPTON COUNTY, PENNSYLVANIA
ORPHAN'S COURT DIVISION

EASTON PUBLISHING COMPANY SHAREHOLDERS, AGREEMENT OF TRUST DATED OCTOBER 1, 1984 ACCOUNT OF HENRIETTA MCPHERSON AND BURLEIGH ARNOLD, SURVIVING TRUSTEES	No. 1987-885

ORDER

AND NOW, this 10th day of February, 1988, on the basis of and pursuant to the terms and conditions of the Stipulation of the Parties which is attached to this Order, it is hereby ordered that the Easton Publishing Company Liquidating Trust under Agreement, dated October 1, 1984, be terminated effective January 31, 1988, that all of the objectives to the First and Partial Account of the Trustees be and are hereby dismissed, that all remaining liabilities, obligations and expenses of Easton Publishing and its subsidiaries and the said Trust be paid and discharged, that a Final Accounting be filed by the Trustees as soon as practicable but in no event later than February 29, 1988, and that the remaining assets of the Trust be distributed to the beneficiaries of the Trust according to their interest therein. Except as to certain amounts to be retained in escrow and disbursed by the law firm of Stitt and Cordts as set forth in Paragraphs six and seven of the within Stipulation.

I, Anna D. Eckert Register of Wills/Clerk of the Orphan's Court of the Court of Common Pleas of Northampton County do hereby certify this to be a true and correct copy of record filed in this office.

Register of Wills/Clerk of the Orphan's Court

APPENDIX B

IN THE

Court of Common Pleas of

NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION — LAW

ALFRED R. BOETTGER, *Plaintiff* vs THOM LOVERRO and EASTON PUBLISHING COMPANY, *Defendants*	No. 1982-C-2846

AFFIDAVIT

STATE OF PENNSYLVANIA }
COUNTY OF NORTHAMPTON } SS

RONALD W. SHIPMAN, ESQUIRE, being duly sworn according to law, does depose and state the following:

1. In the above-captioned matter, I acted as trial counsel for the defendants.

2. Subsequent to a Jury verdict in favor of the plaintiff in the sum of $17,000.00, the defendant, Easton Publishing Company, sold its assets and in order to permit the sale of assets to be completed, notwithstanding the unpaid judgment, the defendant, Easton Publishing Company, deposited, on January 26, 1984, the amount of the judgment in a joint account in my name along with the name of E. Jerome Brose, Esquire, trial counsel for the plaintiff.

3. The account created was Money Market Account No. 89-717-5 at the Lafayette Trust Bank in the name of "Ronald W. Shipman, Esquire and E. Jerome Brose, Esquire,

as Escrow Agents for Easton Publishing Company, its successors and assigns, and Alfred R. Boettger".

4. From the time of the creation of the account I believed that the account was under the joint control of Mr. Brose and myself.

5. On April 3, 1989, there was served upon me Interrogatories in Attachment, copy of which Interrogatories is attached hereto, made a part hereof and marked Exhibit "A".

6. At the time of the service of the Interrogatories upon me, I received a letter from Mr. Brose dated April 3, 1989, a copy of which letter is attached hereto, made a part hereof and marked Exhibit "B".

7. At the time of the receipt of the Interrogatories and the letter from Mr. Brose, I received a copy of the Answer proposed by Mr. Brose, copy of which Answer to Interrogatories is attached hereto, made a part hereof and marked Exhibit "C".

8. Thereafter, on April 21, 1989, within twenty (20) days of the date of the service of the Interrogatories upon me, I filed an Answer to the Interrogatories, a copy of which Answer is attached hereto, made a part hereof and marked Exhibit "D".

9. As stated in the Answer to Interrogatories, as of April 21, 1989, I believed the Money Market Account No. 89-717-5 to be in existence and to continue under my control jointly with Mr. Brose. (See Answer to Interrogatories — No. 2 — Exhibit "D").

10. On September 19, 1989, I received a telephone message from Ruth McGovern, employee of the law firm of Stitt and Cordts, who informed my secretary that the aforementioned money market account had been closed on April 14, 1989, at a time when there was on deposit in said account the amount of $25,742.38.

11. Upon receiving the information from Mrs. McGovern, I communicated with the Bookkeeping Department of the Lafayette Trust Bank and secured from that Department, copies of the following:

a) A withdrawal slip marked "General Debit document" dated April 14, 1989, bearing a signature which I believe to be that of E. Jerome Brose and withdrawing from the aforementioned Money Market Account the sum of $25,742.38, a copy of which General Debit document is attached hereto, made a part hereof and marked Exhibit "E".

b) A copy of the signature card showing both signatures and which card is stamped "Account Closed as of April 14, 1989", copy of which is attached hereto, made a part hereof and marked Exhibit "F".

c) Copy of the Treasurer's Checks on the Lafayette Trust Bank, all of which were dated April 13, 1989, numbered as set forth below with the respective amounts and payees, with endorsement information, following:

No. 021152 payable to Alfred R. Boettger for $3,301.00, endorsed "Alfred R. Boettger" "For Deposit Only — Sounds, Inc."

No. 021153 payable to Poswistilo, Elliott & Elliott for $12,371.38, endorsed "Credited to the Account of the Within Named Payee, Meridian Bank, Reading, Pennsylvania"

No. 021154 payable to Alfred R. Boettger for $270.00, endorsed "Alfred R. Boettger — Pay to the order of E. Jerome Brose — Pay to the order of Jack Bradt for County Executive — E. Jerome Brose — Jack Bradt for County Exec."

d) Lafayette Trust Bank informed me that the balance of the Money Market Account was paid in cash of $9,800.00.

Copies of the aforementioned checks are attached hereto, made a part hereof and marked Exhibit "G".

12. After being informed by Mrs. McGovern that the account was closed and confirming the closing of the account and securing a copy of the aforementioned documents, I telephoned Mr. Brose who informed me that he had closed the account and that he had been able to close the account on his signature alone without my signature. During that conversation, I informed Mr. Brose that until that day, I believed the account was under joint control and was being maintained.

13. Until September 19, 1989, I believed that this Money Market Account was in existence, was earning interest and was under my control jointly with Mr. Brose. I never consented to the closing of the aforementioned account and the distribution of the money as indicated.

/s/
Ronald W. Shipman, Esquire

Sworn to and subscribed before me)
this 29th day of September, 1989)

/s/
Notary Public

APPENDIX C

September 29, 1989

E. Jerome Brose, Esquire
1101 Building
Easton, PA 18042

RE: Boettger — Easton Publishing Company

Dear Mr. Brose:

We have recently become aware that you have withdrawn the money from the escrow account held for the benefit of Boettger and Easton Publishing Company at Lafayette Trust Bank. This account was set up under the understanding that it would not be distributed absent the consent of both escrow agents and only in the event of a final determination of the litigation. On behalf of the Shareholders of the Liquidating Trust formed for the benefit of Easton Publishing Company we hereby make demand that you immediately replace the removed funds.

Very truly yours,

/s/
April L. Cordts

APPENDIX D

IN THE

Court of Common Pleas of

NORTHAMPTON COUNTY, PENNSYLVANIA
CIVIL DIVISION — LAW

ALFRED R. BOETTGER, *Petitioner,* vs. THOM LOVERRO and EASTON PUBLISHING COMPANY, *Respondent.*	No. 1982-C-2846 [Filed March 29, 1989]

PETITION FOR AWARD OF REASONABLE ATTORNEYS' FEES AND OTHER LITIGATION COSTS

TO THE HONORABLE, THE JUDGES OF SAID COURT:

Poswistilo, Elliott & Elliott brings this petition for attorneys' fees and other litigation costs pursuant to the Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S.A. § 5725(a) and avers the following facts in support thereof.

1. This action seeking damages for violation of the Wiretapping and Electronics Surveillance Control Act ("the Act") was tried before a jury and the Honorable Michael V. Franciosa on September 27, 28 and 29, 1983.

2. The jury verdict was for the plaintiff in the amount of $18,409.43, representing $1,000 in actual damages and attorneys fees of $17,409.43.

3. The attorneys' fees recovered in trial represented attorneys' charges incurred prior to trial as well as during the three-day trial itself.

4. Following the verdict, extensive proceedings took place including disposition of defendant's motions for judgment n.o.v. and new trial, entry of judgment on the verdict, appeal of said judgment to the Superior Court, reversal of said judgment by the Superior Court, obtaining allowance of appeal to the Supreme Court and, ultimately, reversal by the Supreme Court of the Superior Court's action and reinstatement of the jury verdict.

5. The Act provides recovery to the plaintiff here of "a reasonable attorneys' fee and other litigation costs reasonably incurred".

6. Attorney's fees for the pretrial work and the trial itself have been recovered via the verdict; however, the post-trial proceedings and certain litigation costs reasonably incurred in the trial were not before the jury and were not contemplated in its verdict.

7. Petitioner sets forth below the uncompensated work and expenses for which claim is made so that the court will have a basis for making an appropriate award.

Judgment N.O.V. and New Trial

For all services in connection with defendant's motion for judgment n.o.v. and new trial, including:

	Hours	
	T.R.E.	E.J.B.
Review of motions		.5
Review of defendant's brief	1.5	1.0
Research cases cited by defendant in order to distinguish or confront	13.0	4.5
Research cases to be cited by plaintiff, Shephardize; memorandum	8.0	1.0
Draft plaintiff's brief, review and redraft	12.5	2.0
Oral argument court en banc, preparation and delivery		2.5
Review of March 6, 1984 opinion	.5	.5
	35.5	12.0

T.R.E. 35.5 hours × $ 75.00 = $2,662.50
E.J.B. 12.0 hours × $100.00 = $1,200.00
$3,862.00

Superior Court

	Hours	
	T.R.E.	E.J.B.
Review reproduced record as produced by defendant	3.5	
Review defendant's brief and cases	6.5	2.5
Research and memorandum	4.5	.5
Draft and redraft of appellee's brief	37.0	4.5
Attend filing and service thereof	2.0	
Preparation and delivery of oral argument, Philadelphia	1.5	8.0
	55.0	15.5

T.R.E. 55.0 hours × $ 90.00 = $4,950.00
E.J.B. 15.5 hours × $125.00 = $1,937.50
$6,887.50

Supreme Court

	Hours		
	T.R.E.	C.W.E.	E.J.B.
Review of Superior Court panel opinion	3.0		2.0
Drafting and redrafting petition for allowance of appeal	1.0		6.5
Filing and service thereof	1.5		
Receipt and review of allowance of certiorari			.5
Preparation of reproduced record for Supreme Court; delivery, service	5.5	2.9	
Review of Superior Court brief to determine need to revise	2.5		.5
WESTLAW search		.3	
Draft and redraft Supreme Court brief	16.0		3.0
Preparation and delivery of oral argument in Philadelphia 11/10/87	2.0		12.5
Review of Supreme Court Opinion of March 8, 1989			1.0
	31.5	3.2	27.0

T.R.E. 34.5 hours × $100.00 = $3,150.00
C.W.E. 3.2 hours × $100.00 = $ 320.00
E.J.B. 12.0 hours × $125.00 = $3,375.00
$6,845.00

Proceedings to Recover Fees

	Hours	
	T.R.E.	E.J.B.
Research recoverability of fees where provision is statutory; study of cases	2.0	
Preparation of petition for fees and expenses	3.5	
Estimated for preparation and attendance at hearing if petition controverted	10.0	
Estimated for briefing and arguing if petition controverted	15.0	

Expenses Reasonably Incurred in Litigation

Expert witness expense of Gus Milides, Esq. who testified in trial on value of attorneys' services	$1,500.00
Travel, parking and meal, Philadelphia,	
for Superior Court argument	36.75
for Supreme Court argument	40.50
	$1,577.25

Recap

Time Incurred	$17,594.50
Estimated Additional Expense If Petition Controverted	$ 2,500.00
Expenses	$ 1,577.25

Wherefore, petitioner prays a rule be issued upon defendant to show cause why $17,574.50 in attorneys' fees and $1,577.25 in reasonable litigation expenses should not be awarded to petitioner if the rule is not controverted or, if controverted, why the additional expense of $2,500 should not be allowed.

POSWISTILO, ELLIOTT & ELLIOTT

By: /s/
Thomas R. Elliott, Jr.
Attorney I.D. No. 29071

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